IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

FILED
JAN 30 1975
MICHAEL RODAK, JR., CLE

No. 73-2000

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

JAMES ROBERT PELTIER, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2050

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

LUIS ANTONIO ORTIZ, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-6848

JOHN LEE BOWEN, *Petitioner,*

—v.—

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-114

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

FELIX HUMBERTO BRIGNONI-PONCE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, *AMICUS CURIAE*

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BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMICUS CURIAE

Interest of Amicus Curiae[1/]

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to secure the civil rights of Mexican Americans through litigation and education. In its efforts to assist the Mexican American community to achieve its rights under the law, MALDEF has been involved in litigation which has challenged the traditional barriers facing Mexican Americans: abridgement of participatory, constitutional, and political rights; unequal educational opportunity; discriminatory employment practices; unequal distribution of public services; and law enforcement misconduct. Because both citizens and lawfully admitted resident aliens of Mexican ancestry are frequently victimized be overzealous searches for illegal aliens, MALDEF has challenged such activities in numerous lawsuits. See, e.g., United States v. Guana-Sanchez, U.S.S.Ct. No. 73-820 (amicus brief); Garcia v. Hoobler, __ F. Supp. ____, Civ. Act. 74-301-T (S.D. Cal. Jan. 8, 1975, Order granting defendants' Motions For Summary Judgment And To Dismiss, with leave to plaintiffs to amend it part).

1/ Letters of consent to the filing of this brief from each party in each case have been filed with the Clerk.

QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits federal officers to conduct an unconsented, warrantless search of the interior of an automobile for illegal aliens when the federal officers do not have probable cause for believing either that the automobile to be searched contains illegal aliens, or that the automobile or its contents have recently crossed an international border.

2. Whether the Fourth Amendment permits federal officers to conduct at fixed checkpoints an unconsented, warrantless search of the interior of an automobile for illegal aliens when the federal officers do not have probable cause for believing that the automobile to be searched contains illegal aliens or that the automobile or its contents have recently crossed an international border.

3. Whether the rationale of Camara v. Municipal Court, 387 U.S. 523 (1967), should be extended to sustain, as a lawful administrative search, the warrantless, unconsented checkpoint search of an automobile's interior for illegal aliens conducted by federal officers, on the basis only of an area-wide equivalent of probable cause, and without probable cause for believing that the automobile to be searched contains illegal aliens.

4. Whether the Fourth Amendment permits federal officers to conduct an unconsented, warrantless stop of an automobile on the public highway to question the occupants concerning their right to be or to remain in the United States where the federal officers do not have reasonable grounds for believing that one or more of the occupants are illegal aliens?

STATEMENT OF THE CASES

The Ortiz Case [No. 73-2050].

On November 12, 1973, Border Patrol agents at the United States Border Patrol Immigration Checkpoint at San Clemente,[2] California, stopped Respondent Ortiz while he was driving a 1969 Chevrolet sedan northward on Interstate Highway 5 toward Los Angeles, California. (Appendix to Petition for Writ of Certiorari at 44A.)[3] The San Clemente checkpoint is located 62 air miles and 66 road miles north of the border and lies north of the densely populated San Diego metropolitan area. (App. Pet. in No. 73-2050 at 24A-25A.) Border Patrol agents at the checkpoint directed respondent's automobile to the secondary inspection area at the side of the road. While conducting a routine search, they found three aliens concealed inside the trunk of the automobile.

At the subsequent trial, District Judge Edward Schwartz ruled that the "San Clemente checkpoint is a permanent checkpoint and that the stopping of the vehicle and the search by the Border Patrol was a valid legal search." (App. Pet. in No. 73-2050

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[2] Hereinafter cited as (App. Pet. in No. 73-2050 at __.)

[3] The Border Patrol is a division of the Immigration and Naturalization Service which is a part of the United States Department of Justice.

at 47A.) After a non-jury trial respondent was then convicted on three counts of transporting aliens who were in the country illegally, in violation of 8 U.S. C. § 1324(a)(1-4).

The Court of Appeals subsequently reversed respondent Ortiz's convictions on the authority of its en banc decision in United States v. Bowen, 500 F.2d 960, cert. granted, __U.S.__, 42 L. Ed.2d 47 (1974). In Bowen, the Court of Appeals held, primarily on the basis of this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), that the Fourth Amendment prohibited a checkpoint search of an automobile for aliens conducted without a warrant and without probable cause unless the checkpoint search was the functional equivalent of a border search. For a checkpoint search to be the functional equivalent of a border search, there must be a reasonable certainty, or at least a probability that the vehicle stopped or its contents had recently crossed an international border. 500 F.2d at 966. Under this test the Ninth Circuit subsequently held in United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974) (en banc), that routine searches of automobiles at the San Clemente checkpoint were not the functional equivalent of border searches. The Ninth Circuit, however, limited its decision in Bowen to checkpoint searches conducted after June 21, 1973, the date of this Court's decision in Almeida-Sanchez. Bowen, supra, 500 F.2d at 975-80. Since the search of respondent Ortiz's automobile occurred

after that date and was not deemed a border search, his conviction based on the illegally seized evidence was reversed.

The Bowen Case (No. 73-6848). Petitioner Bowen on January 19, 1971, was driving a pickup with a camper northward on California State Highway 86 when he was stopped at the United States Border Patrol Immigration Checkpoint. (Appendix at 35.)4/ The checkpoint on California State Highway 86 is located 36 air miles and 49 road miles north of the Mexican Border. (App. Pet. in No. 73-2050 at 30A); the population centers of Heber, El Centro, Brawley, Imperial, Westmoreland and Indio lie between the checkpoint and the border. (App. in No. 73-6848 at 39.) Petitioner satisfied the Immigration Officer on Duty as to his United States citizenship (App. in No. 73-6848 at 36). The officer noticed nothing suspicious or unusual about petitioner Bowen or the camper (App. in No. 73-6848 at 41), but nevertheless, asked him to open up the back of the camper to search for illegal aliens (App. No. 73-6848 at 36). Petitioner Bowen opened the door of the camper, and the officer immediately detected the smell of marijuana (App. in No. 73-6848 at 41). The officer then entered the interior of Bowen's camper through a rear door and, with the assistance of a flashlight, discovered a quantity of marijuana (App. in No. 73-6848 at 36 and 43-47). No illegal aliens were discovered.

4/ Hereinafter cited as (App. in No. 73-6848 at __.).

Bowen's motion to suppress the evidence was denied on August 23, 1971, and he was subsequently convicted by a jury on August 31, 1971 of smuggling marijuana into the United States from Mexico, transporting marijuana, possessing depressant and stimulant drugs in violation of federal law. The Ninth Circuit initially affirmed the convictions in United States v. Bowen, 462 F.2d 347 (9th Cir. 1972), but this Court then remanded the case to the Ninth Circuit for further consideration in light of Almeida-Sanchez, 413 U.S. 915 (1973). On remand, the Ninth Circuit held that routine immigration searches at fixed checkpoints removed from the border, conducted without a warrant or probable cause, violated the Fourth Amendment. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974) (en banc), cert. granted, ___ U.S. ___, 42 L.Ed.2d 47 (1974). Nevertheless, they affirmed Bowen's conviction since the search of his camper occurred prior to this Court's decision on June 21, 1973 in Almeida-Sanchez.

The Brignoni-Ponce Case (No. 74-114). Respondent Brignoni-Ponce on March 11, 1973, was driving north on Interstate Highway 5 near San Clemente, California, when his car was stopped by agents of the United States Border Patrol. (Appendix at 5, 8.)5/ The checkpoint was closed due to lack of manpower and inclement weather, but two Border Patrol agents were on duty parked in a patrol car observing northbound traffic. (App. in No. 74-114 at 6.) The patrol car was parked at a 90° angle to the highway with its headlights on. In the early evening hours, the agents observed Brignoni-

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5/ Hereinafter cited as (App. in No. 74-114 at __.).

Ponce's car going north and decided that they "wished to inspect" it. (App. in No. 74-114 at 6.) The agents' desire to inspect the car was based solely on the occupants' Mexican appearance. (App. in No. 74-114 at 9.) Upon questioning the passengers in Brignoni-Ponce's vehicle concerning their citizenship, the agents determined that they were aliens illegally in the United States. After unsuccessfully challenging the validity of the stop, Brignoni-Ponce was convicted of two counts of transporting illegal aliens in violation of 8 U.S.C. 1324(a)(2). Furthermore, the court rejected the government's attempt to distinguish this case from Almeida-Sanchez on the grounds that Almeida-Sanchez involved a search rather than a stop. The Ninth Circuit reasoned that Almeida-Sanchez "reflects at least as much concern with the initial stop as with the subsequent search." 499 F.2d at 1111. Thus, for purposes of Fourth Amendment protections, roving patrol searches as well as roving patrol stops are prohibited.

Since the stopping of Brignoni-Ponce's automobile and the discovery of illegal aliens occurred prior to the decision announced in Almeida-Sanchez, an issue of retroactive application was raised. In United States v. Peltier, 500 F.2d 985 (9th Cir. 1974) (en banc), the Ninth Circuit held that Almeida-Sanchez would be applied to similar cases pending an appeal at the time of this Court's decision in Almeida-Sanchez. However, in cases involving fixed checkpoint searches conducted prior to Almeida-Sanchez, there would be no retroactive application. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974) (en banc). Since

the Ninth Circuit characterized Brignoni-Ponce's stop as a roving patrol stop rather than a fixed checkpoint stop, Almeida-Sanchez was applied retroactively in this case, resulting in the reversal of Brignoni-Ponce's conviction.

The United States Court of Appeals for the Ninth Circuit reversed the conviction. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974) (en banc). The Court of Appeals unanimously held that a warrantless stop of a vehicle to inquire as to the citizenship of the occupants is permissible under the Fourth Amendment only if the Border Patrol agents have a "founded suspicion" that the occupants of the vehicle are aliens whose presence in this country is unlawful. 499 F.2d at 1112. The mere fact that Brignoni-Ponce and his passengers appeared to be of Mexican descent did not provide the agent with adequate cause to stop the automobile.

The Peltier Case (No. 73-2000). On February 28, 1973, Respondent Peltier was driving northward on United States Route 395 near Temecula, California, when his automobile was pursued and stopped by a roving border patrol. The Border Patrol officers then searched the trunk of the automobile for concealed aliens. The stop took place approximately 70 air miles north of the Mexican border. The Border Patrol agents decided to stop and search Peltier's automobile because he appeared to be of Mexican descent and was driving an old model car. After stopping the car, the agents also observed that it bore out-of-state license plates, that Peltier was alone in the car, and that there were some

clothes in the back seat. Upon searching the car, the agents did not discover any illegal aliens, but did discover a quantity of marijuana in the trunk. Peltier was subsequently convicted in the United States District for the Southern District of California of possessing marijuana with intent to distribute in violation of 21 U.S.C. 844(a)(1), after Peltier's motion to suppress the marijuana as evidence was denied. Subsequent to the District Court's decision, this Court held in Almeida-Sanchez that a warrantless roving patrol search of an automobile for concealed aliens violates the Fourth Amendment when the Border Patrol agents have acted without probable cause for believing that the automobile contained illegal aliens. The Court of Appeals for the Ninth Circuit then reversed Peltier's conviction on the authority of Almeida-Sanchez. United States v. Peltier, 500 U.S. 985 (9th Cir. 1974). Although the roving patrol search in this case occurred before June 21, 1973, the date of this Court's decision in Almeida-Sanchez, the Ninth Circuit held that Almeida Sanchez "should be applied to similar cases pending an appeal on the date the Supreme Court's decisions was announced." 500 F. 2d at 986 (footnote omitted).

SUMMARY OF ARGUMENT

Over the last several decades, this Court has developed a substantial body of Fourth Amendment law. This body of law emphasizes probable cause as the normal predicate for a constitutionally valid search of an automobile's interior. While a somewhat lesser standard may justify the investigatory stop of a person or of an automobile on a public highway, random or routine stops have not received the Court's approval. A separate rationale for routine administrative searches has been developed, but that rationale has so far been limited to cases where there are at least the safeguards of the warrant process or where intensively regulated businesses are involved. Border searches have also received separate treatment, but the government recognizes that the instant four cases do not involve border stops or searches. (Brief for Petitioner United States in No. 73-2050 at 16.)

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) is consistent with this body of law. In this amicus brief MALDEF argues that this Court's basic Fourth Amendment jurisprudence not only dictated the result in Almeida-Sanchez but also requires the Court to condemn the searches and stops in the instant four cases. Automobile searches at fixed checkpoints are essentially no different from automobile searches conducted by roving border patrols, and investigatory stops of automobiles are subject to the same prohibition of routine and random searches. The application of this Court's basic Fourth Amendment law to these cases is especially important to

those Mexican Americans, both citizens and lawfully admitted aliens, who are the actual or potential victims of automobile stops and searches conducted by Border Patrol agents looking for illegal aliens. The application of basic Fourth Amendment principles to these cases would operate to vindicate the rights of United States citizens of Mexican descent, and lawfully resident aliens of similar descent, to travel on the public highway free of random, discriminatory or otherwise unreasonable searches and seizures.

Since no new law is involved in these cases, the basic Fourth Amendment principles developed by this Court should be applied in these cases. Thus, the judgments of the United States Court of Appeals for the Ninth Circuit in Ortiz (No. 73-2050), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000), reversing the respondent convictions, should be affirmed, while the judgment of the United States Court of Appeals for the Ninth Circuit in Bowen (No. 73-6848), affirming the petitioner's conviction, should be reversed. 6/

6/ This brief does not present additional argument on the retroactivity issue presented in Bowen (No. 73-6848), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000). On this issue MALDEF adopts the arguments advanced by each of the defendants.

ARGUMENT

I

PROBABLE CAUSE IS REQUIRED FOR AN UNCONSENTED WARRANTLESS SEARCH BY FEDERAL OFFICERS OF THE INTERIOR OF AN AUTOMOBILE FOR ILLEGAL ALIENS

The defendants in these cases, Ortiz in No. 73-2050, Brignoni-Ponce in 74-114, Peltier in 73-2000 and Bowen in 73-6848, were all doing what hundreds of thousands, if not several million, Americans do every day: they were lawfully driving an automobile on a public highway within one hundred miles of an external boundary of the United States. Border Patrol agents stopped, and in three of the four cases searched, the defendants' automobiles for illegal aliens.

In Ortiz (No. 73-2050), the respondent was stopped and his automobile searched for illegal aliens at a permanent immigration checkpoint on Interstate Route 5 near San Clemente, California, about 62 miles from the Mexican border. (App. Pet. in No. 73-2050 at 43A-45A.) In Bowen (No. 73-6848), the petitioner was stopped and his automobile searched at a similar checkpoint on California State Highway 86 approximately 36 air miles and 49 highway miles north of the Mexican border. United States v. Bowen, 500 F.2d 960, 961 (9th Cir. 1974). Both cases involved routine searches where the Border Patrol officers who conducted the searches had no reason to believe that the drivers of the automobile were other than innocent and law-abiding individuals exercising their rights to operate a motor vehicle on a public

highway within one hundred miles of an external border.

In Brignoni-Ponce (No. 74-114), the agents stopped but did not search the respondent's automobile. The stop occurred to the north of a fixed checkpoint not then in operation. The officers' decision to stop the vehicles was based solely on the occupants' Mexican appearance. (App. No. 74-114 at 9.)

In Peltier (No. 73-2000), the agents both stopped and searched the respondent's automobile at a spot approximately a mile and a half north of a checkpoint that was also not in operation. The agents acted because Peltier was alone driving an old model car with out-of-state license plates in an area the offices knew to be frequented by smugglers of illegal aliens.

This Court has consistently required probable cause as the minimum requirement for a search by federal officers of an automobile stopped on a public highway. Carroll v. United States, 267 U.S. 132, 149 (1925) ("On reason and authority the true rule is that if the search and seizure without a warrant are made upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."). The officers who make the stop must have probable cause for believing that the particular automobile to be searched is carrying seizable items that are the object of the search. Coolidge v. New Hampshire, 403 U.S. 443, 460-62 (1971); Chambers v. Maroney, 399 U.S. 42, 48, 51 (1970): See generally, Note, Warrantless

Searches and Seizures of Automobiles, 87 HARV.L. REV. 835 (1974). This probable cause requirement should be applied to the automobile searches in the instant cases to avoid the creation of a Fourth Amendment free-fire zone in the hundred mile wide strip contiguous to an external boundary of the United States.

Carroll v. United States, 267 U.S. 132 (1925), is the leading case explicitly recognizing the probable cause requirement for automobile searches on public highways. In Carroll, federal officers discovered and seized contraband liquor during the course of a warrantless search of an automobile stopped on a public highway. Federal prohibition agents at that time faced a law enforcement problem comparable in magnitude to that faced today by the Border Patrol. The transporation of contraband liquor by automobiles was an essential part of most boot legging operations just as the transporting of illegal aliens by automobiles in an important part of most alien smuggling operations.

Although recognizing the significant constitutional interest under the Eighteenth Amendment advanced by the officers' actions, nevertheless, in Carroll the Court required that warrantless searches and seizures of contraband located in automobiles be predicated upon probable cause, and held that: "[t]he measure of legality of such a seizure is, ...that the seizing officer shall have reasonable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." 267 U.S. at 155-54. The Court further held that the Fourth Amendment

guaranteed to travellers on a public highway "a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. 267 U.S. at 153.

If the Fourth Amendment requires that federal agents have probable cause for believing that a specific automobile is carrying contraband liquor before they search that automobile for the liquor, it also requires that federal agents have probable cause for believing that a specific automobile is carrying illegal aliens before they search that automobile for the aliens. As stated by the Court in Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973): "...[T]he Carroll doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." (footnote omitted)

Almeida-Sanchez merely reiterated the well established principle that automobiles are protected by the Fourth Amendment. This protection is triggered by an individual's expectation of privacy, Katz v. United States, 389 U.S. 347, 351-52 (1967), and is not dependent on the type of contraband sought to be seized. Thus the mere fact that illegal aliens are the targets of a search should have no bearing on the probable cause requirement afforded by the Fourth Amendment. Such protection is warranted in the cases at bar, moreover, since searches of motor vehicles for illegal aliens are similar in their intrusiveness into constitutionally protected areas as is the search for contraband liquor. The federal agents

may search in the trunk, under the hood, in the interior of a camper or of a pickup truck, behind the back seat, and in any other area of a vehicle where a human being could reasonably be concealed. In Almeida-Sanchez, for example, the agents searched under the rear seat of the automobile, which the Court of Appeals concluded was a place where an alien might conceal himself by removing the springs, 452 F.2d 459, 461 (9th Cir. 1971), rev'd 413 U.S. 266 (1973), while in Bowen (No. 73-6848) and in Peltier (No. 73-2000), respectively, the agents searched the interior of a camper truck and the trunk of an automobile. In United States v. Madueno-Astorga, 503 F.2d 820, 821 (9th Cir. 1974), the agents even removed the back seat of an automobile when the driver was unable to open the trunk.

In the course of these searches federal agents examine areas of the automobile that are private and closed to public view; they may even come across, in "plain view", seizable items other than the illegal aliens which are the object of their searches. In Almeida-Sanchez and many other cases marijuana has been found, and the drivers have been prosecuted for the illegal transportation of marijuana rather than the illegal trasportation of aliens. See, e.g., United States v. Phillips, 496 F.2d 1395 (5th Cir. 1974); United States v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir. 1974); United States v. Martinez-Miramontes, 494 F.2d 808 (9th Cir. 1974). This phenomenum has led at least one circuit court judge to comment in the related area of airport searches that "[i]t is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our

rush toward malleating the Fourth Amendment in order to keep the bombs from exploding." United States v. Legato 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring), cert. den., 414 U.S. 979 (1973).

To prevent abuses in such searches, the scope of the search should be limited by the nature of the item sought to be seized. For example, a search of an automobile for illegal aliens does not authorize a search of the occupants or of the handbags or other similar containers in the automobile. See United States v. Di Ree, 332 U.S. 581, 586-587 (1948). The application of this familiar principle to the instant cases is conceded by the United States in Ortiz. (No. 73-2050) (Brief at 29.)

Certainly, this Court has not vitiated the probable cause requirement for the search of the interior of an automobile on the grounds that such a search is less intrusive than a search of a person or of a dwelling. Although for purposes of the Fourth Amendment there is some constitutional difference between searches of houses and of cars, Chambers v. Maroney, 399 U.S. 42 (1970), this difference results from the high degree of mobility enjoyed by motor vehicles and only permits law enforcement officers in some circumstances to dispense with the warrant requirement. Nothing has affected the probable cause requirement established in Carroll for motor vehicle searches. 399 U.S. at 51. In this respect Cardwell v. Lewis, ___ U.S. ___, 41 L.Ed.2d 325 (1974), is consistent with the Carroll-Chambers line of decisions because in Cardwell, the Court merely upheld a warrantless examination or "search," based on pro-

bable course, of the tire tread and exterior paint of the defendant's automobile. The observation in the plurality opinion, 41 L. Ed.2d at 335, that a person has less of an expectation of privacy in a motor vehicle than in a dwelling, and that automobile searches are therefore less intrusive than residential searches, was not made in the context of the search of the interior of an automobile or camper. If Cardwell had involved an interior search, the plurality's statement that automobiles are seldom a "repository of personal effects" and that their "contents are in plain view" would simply not be true. Millions of Americans carry personal effects in private areas of their automobile, such as the trunk or the glove compartment or the interior of a camper. These areas are concealed from public view by the exterior of the vehicle. An expectation of privacy in one's personal effects should not be defeated simply because one transports them on a public highway. We are a free and mobile society whose members frequently change residences, and who frequently motor to vacations at summer homes, campsites and resort hotels. Surely, our household effects are not fair game for an unconsented warrantless non-probable cause search simply because they are in transit in the interior of a motor vehicle on a public highway. As noted in Coolidge v. New Hampshire, 403 U.S. 443, 461-62(1971), "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." This Court therefore should not sanction warrantless interior automobile searches on less than probable cause on the ground that such searches are less intrusive than other searches.

A final consideration to be taken into account concerns a widespread practice of apprehending illegal aliens by state and local law enforcement agencies. In the Southwest, city police, county sheriffs, and other law enforcement officers often participate in stopping, detaining, and interrogating persons to determine their citizenship. E.g., United States v. Mallides, 473 F.2d 859 (9th Cir. 1973) (two city police officers stopped an automobile due to their suspicion that the car contained illegal aliens); United States v. Guana-Sanchez, Cr. No. 72 CR 50 (Unreported decision, N.D. Ill. June 8, 1972), affirmed, 484 F.2d 590 (7th Cir. 1973), cert. granted, ___ U.S. ___, 41 L.Ed.2d. 1138 (1974) (No. 73-820). If the protections afforded by the Fourth Amendment are not made applicable to these stops, then state and local law enforcement officials can stop any person of Mexican descent ostensibly for the purpose of determining the person's citizenship. Thus local law enforcement officials will be able to circumvent the guarantees provided by the Fourth Amendment simply by relying on the wide discretion afforded to immigration officers pursuant to 8 U.S.C. §1357(a)(1). See United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973) (where immigration officials were held to be empowered to stop individuals to determine their citizenship without a warrant, without probable cause, and even without reasonable suspicion that the persons are illegal aliens).

Thus both to identify further the limitations on the stop and search powers of federal Border Patrol officers, and to help prevent state and local police circumvention

of the Fourth Amendment rights of Mexican appearing individuals, this Court should apply the probable cause requirement to unconsented, warrantless searches of automobiles by federal officers seeking illegal aliens.

ARGUMENT

II

PROBABLE CAUSE IS REQUIRED FOR AN UNCONSENTED WARRANTLESS SEARCH BY FEDERAL OFFICERS OF THE INTERIOR OF AN AUTOMOBILE FOR ILLEGAL ALIENS CONDUCTED AT A FIXED CHECKPOINT.

In Ortiz (No. 73-2050) and in Bowen (No. 73-6848) the automobile searches were conducted at fixed border patrol checkpoints, at San Clemente, California, and on California State Highway 86, respectively, while in Peltier (No. 73-2000) the respondent's automobile was stopped and searched by a roving border patrol. In Brignoni-Ponce (No. 74-114) there was no automobile search. The government concedes that the fixed checkpoint at San Clemente, Brief for Petitioner in Ortiz, No. 73-2050 at 16, is not the functional equivalent of the border permitting a warrantless full-scale border-type search of a vehicle for aliens or contraband because it cannot be said with any degree of assurance that the vehicles searched or their contents had recently crossed the border. This concession would also seem to cover the checkpoint on California State Highway 86 which the Court of Appeals in United States v. Bowen, 500 F.2d 960, 966 (9th Cir. 1973) (en banc), specifically found not to be the functional equivalent of the border since there was no reasonable certainty or even probability that the vehicles searched or their contents had recently crossed an international border. The government nevertheless argues in these cases that Almeida-

Sanchez v. United States, 413 U.S. 266 (1973), only condemns warrantless automobile searches for aliens conducted without probable cause by roving patrols and does not affect similar searches at fixed checkpoints. This distinction is untenable, and the Fourth Amendment, as consistently construed by this Court from Carroll v. United States, 267 U.S. 132 (1925), through Almeida-Sanchez in 1973, prohibits both roving patrol and fixed checkpoint searches for aliens that are conducted by federal agents without consent, without a warrant and without probable cause.

The fixed checkpoints in these cases are not "fixed" by any immutable necessity or by any court order but by executive officials within the Border Patrol. The government recognizes that the sites for fixed checkpoints are selected "as the result of careful study by relatively high-level officials of the Border Patrol." (Brief for Petitioner in Ortiz, No. 73-2050 at 13.) Even assuming that the Border Patrol has engaged in careful study in selecting the sites for fixed checkpoints, additional study, especially of the data collected from the operation of existing checkpoints, may convince the Border Patrol to open new checkpoints or to move existing checkpoints. A "fixed" checkpoint is therefore fixed only by executive decision and may move and become "roving" by executive decision. There is nothing inherently fixed about any checkpoint's location. While some locations may be more suitable geographically than others, functionally a checkpoint is very mobile. The signs, traffic cones, lights, and uniformed officers which are

the essential elements of a checkpoint may readily be assembled, with portable or temporarily installed equipment if necessary, at a new location where there is an adequate stretch of open road to permit safe operation.

The Border Patrol has statutory authority to search vehicles for aliens, and presumably to establish checkpoints to accomplish these searches, within a reasonable distance from any external boundary of the United States. 8 U.S.C. 1357(a)(3). "Reasonable distance" has been defined by regulation to mean 100 miles in most cases. 8 C.F.R. 287.1. While this statute and regulation cannot authorize the Border Patrol to conduct otherwise unconstitutional searches, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973), they do authorize the Border Patrol within constitutional limits to site checkpoints and search vehicles, operated to uncover illegal aliens, anywhere within one hundred miles of the border. Under the authority conferred by the statute and the regulations, the Border Patrol could conceivably establish a "fixed" checkpoint anywhere on the New Jersey Turnpike to search vehicles for illegal aliens.7/

7/ The government recognizes that checkpoint searches at Times Square, and presumably also on the New Jersey Turnpike, would be unreasonable and hence unconstitutional because the local conditions at those sites do not provide the "area-wide equivalent of probable cause" which the government argues is the sole constitutional

More realistically, the Border Patrol may find at some future date that it is more effective to replace its temporary checkpoints with a system of mobile checkpoints on both main and back roads that operate to surprise the smuggler of illegal aliens by moving or "roving" from one location to another. Since no checkpoint is permanently fixed and since mobile checkpoints are no different than roving patrols, the Fourth Amendment prohibits warrantless automobile searches for aliens without probable cause at Border Patrol checkpoints.

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prerequisite for a checkpoint search. (Brief for Petitioner in Brignoni-Ponce, No. 70-114, at 19.) This recognition that many potential checkpoint locations would be unconstitutional undermines the government's contention that subsequent judicial consideration of the reasonableness of the checkpoint's operation in the context of a motion to suppress is an adequate substitute for advance judicial approval of the checkpoint's operation through a warrant procedure. How many innocent motorists will be subject to unconstitutional vehicle searches at a checkpoint whose location is improper before a guilty one is found who subsequently challenges the search by a motion to suppress in a criminal prosecution? The number may be very high indeed because the subsequent judicial challenge may be slow in coming, particularly if the government exercises its discretion, as it frequently does, not to prosecute illegal aliens criminally but to deport them.

There is another, more basic reason why fixed checkpoint searches of automobiles for illegal aliens should be treated the same as roving patrol searches. In Almeida-Sanchez, the Court condemned the roving patrol search because it "was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause or consent." 413 U.S. at 268 (footnote omitted). Checkpoint searches are also conducted in the "unfettered discretion" of Border Patrol agents without a warrant, probable cause or consent. Only a small percentage of the automobiles that pass through a fixed checkpoint are searched for aliens. At the busy San Clemente checkpoint only three per cent of the vehicles are even stopped for inquiry regarding the citizenship of the occupants and for possible search of the car. (App. Pet. in No. 73-2050 at 16A-17A.) At the checkpoint on California State Highway 86 the Border Patrol is more active and seventy-five per cent of the vehicles are stopped for inquiry but only ten or fifteen per cent are searched for illegal aliens. (App. Pet. in No. 73-2050 at 30A). Nationwide, the Border Patrol estimates that approximately 27.4 million vehicles passed through "fixed" checkpoints in fiscal year 1974. Only 320,000 vehicles, slightly over one per cent of the total, were subjected to a physical inspection or search for aliens. (Brief for Petitioner in Ortiz, No. 73-2050 at 28-29.)

The "fixed checkpoint" thus closely resembles the roving border patrol because only a small percentage of the vehicles encountered or observed by the federal agents

operating either the "fixed" checkpoint or the roving patrol are stopped and searched. The majority of the Court of Appeals recognized this important factor in United States v. Bowen, 500 F.2d 960, 964 (9th Cir. 1974) (en banc): "Since not all vehicles passing through a checkpoint are stopped, and since not all vehicles stopped are searched, the officer at the checkpoint still retains a good deal of discretion to 'single out' some travelers for stops or intrusive searches."

No doubt some roving patrol operations, especially those conducted at night, are more frightening or traumatic to the driver and occupants of the car searched than are the more anticipated and orderly "fixed" checkpoint searches. However, it is only the stop by the roving patrol which may have a different traumatic effect and not the subsequent search of the private areas of the vehicle's interior. The search of the vehicle is exactly the same regardless of whether it takes place on the open highway or at a "fixed" checkpoint. Furthermore, Border Patrol agents on roving patrol apparently are uniformed and in official vehicles. The indicia of lawful authority thus quickly become evident to a driver stopped by a roving border patrol, just as the indicia of lawful authority are evident to the driver who approaches a "fixed" automobile checkpoint. In both instances a search of the automobile for illegal aliens is normally conducted at the side of the road to avoid blocking ongoing traffic. The search -- the warrantless, unconsented search, not based upon probable cause -- is an indignity that innocent drivers and passengers should not be subjected

to at the whim of the Border Patrol agent. The crucial factor is whether or not there is probable cause for the search by law enforcement officers, and not whether the search takes place at night or in the daytime or on the open road or at a "fixed" checkpoint.

The unfettered discretion of Border Patrol agents at "fixed" checkpoints to search some vehicles for illegal aliens while not searching the great majority of vehicles which pass through the checkpoints adversely affects the rights of Mexican Americans in two respects. First, the initial stop is usually based upon constitutionally impermissble criteria, e.g., a person's Mexican appearance. Second, these arbitrary stops infringe the victims' constitutional right of interstate travel.

In both Brignoni-Ponce (No. 74-114) and in Peltier (No. 73-2000), the Border Patrol agents stopped the respondents' automobiles because the occupants appeared to be of Mexican descent. It is not a crime to be of Mexican descent, nor is a person's Mexican appearance a proper basis for arousing an officer's suspicions. Those broad descriptions literally fit millions of law abiding American citizens and lawfully resident aliens. United States v. Camacho-Davalos, 488 F.2d 1383 (9th Cir. 1973). The Ninth Circuit has rightly condemned law enforcement officers, both state and federal, who stop cars because their occupants fit the loose description of "Mexican appearing." United States v. Mallides, 473 F.2d 849 (9th Cir. 1973)(state officers); United States v. Brignoni-Ponce, 499 F.2d 1109

(9th Cir. 1974)(Border Patrol agents).

A person's racial or ethnic background or appearance is a neutral factor in appraising probable cause or reasonable suspicion, United States v. Bugarin-Casas, 484 F.2d 853, 854 (9th Cir. 1973), cert. den., ___U.S. ___, 94 S. Ct. 881 (1974); and to permit law enforcement officers to base their decision to stop or search an automobile on the racial or ethnic appearance of the occupants would be to sanction the very same discriminatory law enforcement condemned in Yick Wo v. Hopkins, 118 U.S. 356 (1886) as violative of the Equal Protection Clause of the Fourteenth Amendment. Such a conclusion is compelled by this Court's recent decisions characterizing Mexican Americans as an identifiable group for Fourteenth Amendment purposes. See Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973); White v. Regester, 412 U.S. 755 (1973); Hernandez v. Texas, 347 U.S. 475 (1954). This discrimination is inevitable if Border Patrol agents enjoy unfettered discretion to search whatever vehicles they chose, since they will naturally continue to focus on drivers of Mexican descent or who are of Mexican appearance, or whose passengers meet these criteria, as the most likely targets for routine or random vehicle searches.

Persons of Mexican descent or appearance enjoy the same constitutional right to travel on the public highways free of unreasonable searches and seizure as do other United States citizens and lawful resident aliens. The basis for this fundamental right was recognized in Carroll v.

United States, 267 U.S. 132, 153-54 (1925):

> Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

The Carroll decision, of course, is fully consistent with more judicial and congressional decisions extending and protecting the constitutional right of interstate travel. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969), modified, Edelman v. Jordan, ___ U.S. ___, 94 S. Ct. 1347 (1974); Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a et seq. (Public Accomodations).

The records in the cases at bar clearly demonstrate the substantial danger of infringement of the right of travel resulting from the present operations of "fixed"

checkpoints. By imposing the protections afforded by the probable cause requirement on searches conducted at "fixed" checkpoints, as they already have been imposed on the searches conducted by roving patrols, the Court will prevent further violations of the rights of Mexican Americans to travel on the highways without the fear of being stopped or searched merely because of their Mexican appearance.

ARGUMENT

III

WARRANTLESS UNCONSENTED CHECKPOINT SEARCHES OF AUTOMOBILE INTERIORS FOR ILLEGAL ALIENS CONDUCTED BY FEDERAL OFFICERS WITH ONLY AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE ARE NOT ADMINISTRATIVE SEARCHES PERMISSIBLE UNDER CAMARA v. MUNICIPAL COURT, 387 U.S. 523 (1967)

The government argues in Ortiz that there existed an area-wide equivalent of probable cause at the San Clemente checkpoint that made the automobile search constitutional even though the Border Patrol agents who conducted the search had no probable cause for believing or even a reasonable basis for suspecting that Ortiz's automobile was carrying illegal aliens. The government's chief authority for this argument is Camara v. Municipal Court, 387 U.S. 523 (1967). In Camara this Court held that an unconsented warrantless search of an apartment building by municipal building inspectors violated the Fourth Amendment but concluded that a warrant could be obtained on the basis of area-wide probable cause "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." 387 U.S. at 538. If there is area-wide probable cause, the constitutionality of the search of a dwelling for building code violations "will not necessarily depend upon specific knowledge of the condition of the particular dwelling." 387 U.S. at 538.

Camara reconciled the unique conflict between the homeowner's Fourth Amendment rights and the community's need to prevent and abate dangerous and unsanitary conditions. An unthinking and unhesitating application of Camara beyond the exceptional facts of such a case may lead to a general erosion of Fourth Amendment rights. Comment, Area Search Warrants in Border Zones: Almeida - Sanchez and Camara, 84 Yale L.J. 355, 370 (1974). Labelling a search as an administrative inspection does not eliminate the protective role of the Fourth Amendment. One of the hallmarks of a totalitarian society is the subjection of the citizenry to a myriad of routine administrative searches or inspections to ensure that the governed are not about to make any trouble for the government. Privacy and personal security, values which the Fourth Amendment is intended to protect, are lost in the process of identity checks and physical inspections. This Court should therefore be very hesitant in approving routine administrative "inspections" where federal officers lack the traditional probable cause to search.

The Court in Camara upheld the reasonableness of area code-enforcement because it found a long history of judicial and public acceptance, of such searches in the urban health context, a strong public interest that all such dangerous conditions be prevented or abated, and a relatively limited invasion of the urban citizen's privacy. The inspection of a dwelling for code violations was a relatively limited intrusion because the inspection was "neither personal in nature nor aimed at the discovery of evidence of crime." 387 U.S. at 537.

Searches of automobiles for illegal aliens, on the other hand, are personal in nature and aimed at the discovery of evidence of crime. The knowing transportation by automobile of illegal aliens is a felony punishable by a maximum of five years under 8 U.S.C. §1324(a)(2). Illegal aliens are thus a form of contraband, and searches of automobiles for illegal aliens are no different than searches of automobiles for contraband liquor. Both are searches for criminal evidence. Building codes, by comparison, are generally enforced by the inspector's issuance of an administrative compliance order to correct any violations discovered on the premises. The violation of the administrative order, not initial the presence of the code violation, is the criminal offense. Even if the presence of the code violation is itself a crime, as was the case under the New York City code provision cited in Camara, 387 U.S. at 531 n. 7, the penalties are generally light and the crime is one of the public welfare variety.

Building inspections are therefore administrative searches because their primary function is to insure that homeowners correct any violations on their premises. Vehicle searches for illegal aliens, on the other hand, are not transformed from searches for criminal evidence into permissible administrative searches simply because any illegal aliens discovered are normally deported rather than prosecuted criminally. It could just as well be argued that vehicle searches for untaxed liquor are administrative searches because the contraband liquor is always destroyed but the transporter may not always be prosecuted criminally. In

addition, smugglers of illegal aliens are prosecuted under 8 U.S.C. §1324(a)(2) for transporting illegal aliens, which is precisely what happened to Ortiz and Brignoni-Ponce in the instant cases.

While the illegal aliens who are passengers in the vehicle may be deported and not prosecuted criminally, the driver, who is the victim of the search, may well be prosecuted criminally, especially if he is an American citizen and therefore not subject to deportation. The Immigration and Naturalization Service's own reports indicate that during fiscal 1972, 2,927 violations of 8 U.S.C. §1324(a)(2), which punishes knowing transportation of illegal aliens, were presented to United States Attorneys for possible prosecution. Prosections were authorized in 731 or approximately one quarter of these cases. Only 873 violations of 8 U.S.C. §1324(a)(2) were closed by blanket or general waiver. By comparison, more than twenty times as many violations of 8 U.S.C. §1325, which punishes illegal entry, were closed administratively than were ever presented to tha United States Attorneys for possible prosecution. (A total of 376,197 violations of 8 U.S.C. §1325 were reported; of these only 16,783 were presented to the United states Attorneys for prosecution.) Hearings on H.R. 982 Before Subcommittee No. 1 of The House Committee on The Judiciary, 93rd Cong., 1st Sess., 31-32 (1973). Searches of automobiles for illegal aliens should therefore be treated in the same fashion as are searches of automobiles for contraband and other evidence of crime.

Camara is also distinguisable because

the need for building inspections for code violations is greater than is the need to search automobiles for illegal aliens. There is no way to determine whether the interior of a dwelling complies with a building code other than to inspect its interior. Illegal aliens may be apprehended in many ways in addition to searching the interior of vehicles on a public highway. Increased efficiency certainly is not a sufficient reason for subjecting all motorists within one hundred miles of our external boundary to arbitrary vehicle searches. Finally, the remaining reason advanced by the Court in Camara for modified search and seizure standards, the long history of judicial and public acceptance of area-wide building inspections, is not applicable in the context of vehicle searches for illegal aliens. "Although prior circuit court approval of these searches is technically a history of judicial acceptance it is insignificant in comparison with the history supporting the Camara court. Camara involved a practice that not only had been accepted for more than 150 years but also had been previously upheld by the Court in Frank v. Maryland." Comment, Area Search Warrant in Border Zones: Almeida - Sanchez and Camara, 84 Yale L.J. 355, 362 (1974).

For these reasons Camara should not be extended to permit area-wide probable cause to serve as the basis for automobile searches for illegal aliens in places as remote from the border as the San Clemente and California State Highway 86 checkpoints. The record does not indicate how many vehicles pass through these checkpoints annually or daily or how many vehicles are

searched, but it cannot be disputed that the overwhelming majority of vehicles potentially or actually subject to search are not transporting illegal aliens. While twenty or thirty illegal aliens may be apprehended in a normal 8 hour shift at San Clemente (App. Pet. in No. 73-2050 at 25A), the number of vehicles searched surely is much higher. If the approach were adopted that such limited results justified are wide searches for criminal evidence, large areas of this country might become in effect free-fire zones where area-wide searches for illegal aliens, or for other forms of contraband such as bombs, illegal handguns or narcotics, would be permissible because the relatively higher incidence of such contraband within the given areas would justify area-wide searches to uncover the evidence.

If area-wide probable cause is ever to justify vehicles searches for illegal aliens, advance judicial approval should be required through the warrant process, as it was in Camara for building inspections. Subsequent judicial consideration of the reasonableness of a program of adminstrative searches conducted on the basis of area-wide probable cause is not an adequate substitute for advance judicial approval because many innocent motorists will be subject to possible unconstitutional searches before a "guilty" one comes forward and subsequently changes the search by a motion to suppress in a criminal prosecution. See, infra, at p. n. . Furthermore, the government's argument that a warrant process is unworkable because the Border Patrol must retain a degree of surprise and flexibility in opening temporary checkpoints (Brief for Petitioner in Ortiz, No. 73-2050, at 41), indicates that the

Border Patrol wants to retain the authority to search at whim (or "seasoned judgment" as the government puts it) all vehicles in the Border area. The danger of arbitrary, discriminatory law enforcement adversely affecting the constitutional rights of innocent Mexican-Americans is too great to permit federal agents to conduct such searches without probable cause, without consent, and without advance judicial approval.

ARGUMENT

IV

THE FOURTH AMENDMENT DOES NOT PERMIT FEDERAL OFFICERS TO MAKE RANDOM, WARRANTLESS STOPS OF AUTOMOBILES ON THE PUBLIC HIGHWAY TO QUESTION THE OCCUPANTS CONCERNING THEIR RIGHT TO BE IN THE UNITED STATES.

In Brignoni-Ponce (No. 74-114), Border Patrol agents stopped respondent's automobile on the public highway and questioned its occupants as to their right to be in the United States. The stop did not take place at a fixed checkpoint but on the open highway. The Border Patrol agents who stopped respondent's automobile had observed many vehicles pass without stopping them before they stopped Brignoni-Ponce's automobile. The agents pursued and stopped the automobile for a routine immigration inspection solely because they observed that its three occupants appeared to be of Mexican descent; the agents had no basis for believing that either Birgnoni-Ponce or his two passengers were illegal aliens. 499 F.2d at 1112. The agents quite plainly intended to search the interior of the automobile and did so; but only after they had discovered that the passengers were illegal aliens.

The government contends that this "stop" and the subsequent search are not controlled by this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). They claim that Almeida-Sanchez interpreted only 8 U.S.C §1357(a)(3), which

authorizes "...the board[ing] and search-[ing] for aliens... [of] any... vehicle...." The stop in the Brignoni-Ponce case, the government claims, was authorized under 8 U.S.C. §1357(a)(1), which authorizes Border Patrol agents "without warrant ...to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States...." Almeida-Sanchez, however did not turn on the nicety of the authorizing statute relied upon by the government. It was a decision examining the scope of Fourth Amendment protections. Even adopting the goverment's approach, its attempt to distinguish the instant case from Almeida-Sanchez, is unavailing.

The stop of Brignoni-Ponce's automobile was a "seizure" of the automobile and its occupants for Fourth Amendment purposes. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. 1, 16 (1968). If stopping a person walking on the street to inquire about his activities constitutes a "seizure" of the person, stopping an automobile on a public highway to question its occupants about their right to be in the United States similarly constitutes a seizure of the automobile and of its occupants. "A person whose vehicle is stopped by police and whose freedom to drive away is restrained is as effectively 'seized' as is the pedestrian who is detained." United States v. Mallides, 473 F.2d 859, 861 (9th Civ. 1973). The occupants plainly are not free to leave while the questioning con-

tinues. Conceivably the driver or owner of the automobile is free, if the agents do not assert a right to search the automobile, to direct any available third party to remove it from the scene to any location he desires. However, the automobile has, nevertheless, been forcibly stopped and immobilized on the public highway and must remain stopped until the inquiry of its occupants is completed or arrangements are made to conduct the inquiry at a place separate from the automobile.

Random, roving patrol stops or seizures of antomobiles on the public highway, therefore, impose seizures and indignities that cannot be brushed aside as modest intrusions undeserving of significant Fourth Amendment protections. The stops abridge the driver's "right to free passage without interruption or search." Carroll v. United States, 267 U.S. 132, 154 (1925). It also adversely affects his interests in personal security. Law enforcement officers who pursue automobiles and direct them to the side of the road normally have cause to believe that there has been a violation of the law. At least this is the popular understanding of what is involved when a driver is forced to the side of the road by a police officer. Drivers stopped in this fashion naturally inquire of themselves: Why me? What have I done? Why did they pick on me? It is therefore a significant intrusion on personal liberty if a person lawfully driving on the public highway is ordered by Border Patrol agents to pull over to the side of the road and is detained there by the agents until they have finished their inquiries. The intrusiveness of the stop is further demonstrated by the fact that the

agents may take advantage of the plain view doctrine to observe much of the automobile's interior and may in appropriate cases even frisk for weapons those occupants of the automobile whom they reasonably believe to be armed and dangerous. Adams v. Williams 407 U.S. 143 (1972).

This Court has not separately treated the level or quantum of cause required for the stopping of individual vehicles on a public highway. Probable cause is necessary to stop and search an automobile for contraband or other evidence of crime, Chambers v. Maroney, 399 U.S. 42 (1970), and there is no clear indication that a smaller quantum of information will suffice to justify a stop alone. This Court has in any case never sanctioned random and potentially discriminatory stops of automobiles. The Court's opinion in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), reflects at least as much concern with the random stop of the defendant's automobile in that case as with the subsequent random search of the automobile's interior:

> "It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search...."

413 U.S. at 268 (emphasis added).

> "[N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case...."

413 U.S. at 272 (emphasis added).

At the very least this Court should require for an investigatory stop of an automobile and the interrogation of its occupants by federal officers the same level of cause that is required for the investigatory stop and interrogation of a pedestrian. In both instances law enforcement officers "must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant... [t]he intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968). Any lesser standard would make a person's freedom of movement on the public highway subject to the inarticulate and unsubstantiated "hunches" of Border Patrol agents. 392 U.S. at 22.8/

8/ The stopping of automobiles by state and local police to check for operator's licenses and automobiles registrations raises different issues than do investigatory stops by Border Patrol agents. There is no way to determine whether the operator of a motor vehicle is properly licensed other than to stop the vehicle and question the driver. There are many ways to apprehend illegal aliens. Furthermore, the primary purpose of license checks is regulatory. In order to promote safety on the highways, police officers must be able to take reasonable measures to insure that only properly licensed drivers operate motor vehicles on the public highways. Despite these distinctions, there is nevertheless a division of authority on whether random vehicle stops to check operator's licenses are constitutional and there is a strong basis for arguing that to be constitutional stops for license checks must be conducted according to a systematic non-discretionary procedure and not on a random basis at the whim or uncontrolled discretion of police officers, Note, Automobile License Checks and the Fourth Amendment, 60 VA.L.REV. 666, 695-96 (1974).

The United States argues in Brignoni-Ponce (No. 74-114) that Section 287a(1) of the Immigration and Nationality Act, 8 U.S. C. §1357(a)(1), authorizes Border Patrol agents to stop any vehicle anywhere in the United States and question its occupants whenever the agents believe the vehicle contains aliens. (Brief of Petitioner in Brignoni-Ponce, No. 74-114, at 17-18.) The government does not indicate on what basis the agents believed Brignoni-Ponce or his passengers to be aliens. The government is evidently willing to accept the notion of alienage at a glance. For the agent believed that Brignoni-Ponce and his passengers were aliens simply because they looked like aliens, i.e., they appeared to be of of Mexican descent. Many United States citizens are of Mexican descent, and the government seemingly argues that the briefest glance at an individual by a Border Patrol agent permits the agent to arrive at a "belief" that the individual is not only of Mexican descent but also an alien from Mexico. Surely this approach gives free rein to the inarticulate and unsubstantiated hunches of Border Patrol agents and subjects Mexican Americans to discriminatory stops based solely on their racial appearance.

There is simply no rational basis for believing that a person of Mexican appearance traveling in an automobile on an Interstate Highway in Southern California is an alien, much less for believing that he is an alien whose presence in this country is illegal. Settlers and immigrants have come to this country from all corners of the globe, and most United States citizens today

bear to a greater or lesser extent the physical characteristics of persons dwelling in country or countries of origin. The physical characteristics of many Mexican American citizens may more clearly identify their country of origin than do the physical characteristics of citizens of Irish, German or other European descent. Mexico is also a country that shares a lengthy boundary with the United States and is the source of many illegal aliens within the United States. Nevertheless, to protect the constitutional rights of these Mexican American citizens and lawfully admitted aliens this Court should permit under 8 U.S.C. §1357(a)(1) the investigatory stop of a vehicle and the questioning of its occupants by the Border Patrol only when the Border Patrol agents have knowledge of specific and articulable facts that gives them reason to believe that the vehicle contains aliens whose presence in this country is illegal. 9/

9/ The government recognizes that it is only the high incidence of illegal aliens in border areas of the country that justify investigatory stops under 8 U.S.C. §1357(a)(1) and searches under 8 U.S.C. §1357(a)(3). (Brief for petitioner in Brignoni-Ponce, No. 74-114 at 13; Brief of Petitioner in Ortiz, No. 73-2050 at 20) and does not advance the potentially broader justification that federal officers may stop and search in order to keep under surveillance aliens whose presence in this country is lawful. The object of the stops and searches conducted under those sections in these cases was the discovery of aliens whose presence in this country is illegal. See e.g., App. in No. 73-6848 at 36 where the Border

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Even the government recognizes that there is a difference between "what the Fourth Amendment may tolerate on the one hand and what the Immigration and Nationality Act may authorize on the other" (Brief for Petitioner in Brignoni-Ponce, No. 74-114 at 16), and that 8 U.S.C. §1357(a)(1) constitutionally can only authorize investigatory stops of vehicles where there is an area-wide equivalent of "reasonable suspicion not amounting to probable cause." (Id. at 14.) The government argues that the Fourth Amendment permits Border Patrol agents to stop all vehicles in such areas to question the occupants on their right to be or to remain in the United States (id. at 8) and evidently treats the additional requirement that the agents believe that the occupants are aliens to be solely a statutory requirement under 8 U.S.C. §1357(a)(1) and not a constitional requirement. Where there is an area-wide equivalent of reasonable suspicion not amounting to probable cause, the government argues that the suspicion "need not be focused with particularity on the specific vehicle to be stopped. It may be based, instead, upon knowledge of conditions in the area as a whole." (Id. at 14.)

The government recognizes that conditions in many areas of the country would not justify random vehicles stops on an area-wide basis (id. at 19) but leaves the creation of such free fire-zones to be unfettered discretion of executive officials in the Border Patrol without any prior judicial

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Patrol agent testified on direct examination, "I asked him to open up the back of the camper for a search for illegal aliens."

approval through the warrant process. Although the government indicates in its brief (id. at 19) that conditions in New York City would not provide an area-wide equivalent of cause sufficient to justify random vehicles stops, recent statements by the Commissioner of the Immigration and Naturalization Service indicate that there are a high concentration of illegal aliens in the New York Metropolitan area, perhaps more than one million. (New York Times, December 29, 1974, p.1 col.5 and December 31, 1974, p.26 col.1, City Edition.) Might not the Border Patrol create a new area for random stops of vehicles in portions of the New York Metropolitan Area where a large number of illegal aliens are believed to be employed? At the very least any such program of area-wide stops should be subject to the prior control of the warrant process since the burden of obtaining a warrant is not likely "to frustrate the governmental purpose behind the search." Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

The government evidently believes that area-wide cause for stopping vehicles and questioning their occupants exists throughout the border region (Brief for Petitioner in Brignoni-Ponce, No. 74-114 at 19). If Border Patrol agents can make a warrantless stop of Birgnoni-Ponce's automobile on an Interstate Highway, 60 or so miles from the border, they could just as readily do so on a residential street in San Diego, which is also in the border region. Mr. Justice Powell in his concurring opinion in Almeida-Sanchez envisioned a more particularized judicial definition of the relevant "area" when he spoke approvingly of advance judicial approval for roving patrol stops and

searches "on a particular road or roads for a reasonable period of time." 413 U.S. at 282. If the Border Patrol is given discretion to create at will broad areas throughout the country for random stops, it will be resolving by itself "the type of delicate questions of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive." 413 U.S. at 284. (Powell, J., concurring.) In addition, before approving any program of area-wide stops, the judiciary could require safeguards to protect the rights of Mexican Americans from discriminatory stops based solely on their racial physical appearance.

CONCLUSION

For the above reasons, and those stated in the briefs of the parties supported by the amicus curiae, the decisions in Ortiz (No. 73-2050), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000) should be affirmed, and the dcision in Bowen (No. 73-6848) should be reversed.

Respectfully submitted,

January 1975

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